Supreme Court, U.S.
FILED
SEP 8 - 2003
OFFICE OF THE CLERK

29

No. 02-1315

In the
Supreme Court of the United States

GARY LOCKE,
Governor,
State of Washington,
Petitioner,

v.

JOSHUA DAVEY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATE OF ALABAMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

William H. Pryor Jr.
Attorney General

Nathan A. Forrester
Solicitor General

Margaret L. Fleming
Assistant Attorney General
Counsel of Record *

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401, 353-3738 *

September 8, 2003

29 pp

QUESTION PRESENTED

Does a State violate the first and fourteenth amendments to the United States Constitution when it refuses to award a state-funded scholarship to an otherwise eligible student for the sole reason that the student intends to major in theology?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The States May Not Invoke Principles of Federalism to Justify Overt Discrimination Against Religion. 4

II. Alabama's Own Constitutional History Exemplifies the Invidious Purpose of State Education Funding Programs That Exclude Participants on the Basis of Their Religion. 9

A. Alabama's Blaine provision was designed to stifle the growth of Roman Catholic beliefs within the State. 10

B. Alabama has recognized that its student grant program, which, like Washington's Promise Scholarship program, excludes religious participants and was enacted to comply with a Blaine provision, violates the first and fourteenth amendments. 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Alden v. Maine, 527 U.S. 706 (1999) 4

Alexander v. Sandoval, 532 U.S. 275 (2001) 7

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 6

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 2, 20

City of Boerne v. Flores, 521 U.S. 507 (1997) 6, 20

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) 8

Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) 2, 9, 20

Garrett v. Univ. of Alabama at Birmingham Bd. of Trustees, 531 U.S. 356 (2001) 6

Gregory v. Ashcroft, 501 U.S. 452 (1991) 6

Larson v. Valente, 456 U.S. 228 (1982) 2, 20

Norwood v. Harrison, 413 U.S. 455 (1973) 8

Owasso Independent School Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002) 6

Raygor v. Regents of Univ. of Minnesota, 534 U.S. 533 (2002) 6

Rinaldi v. Yeager, 384 U.S. 305 (1966) 7

Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995) 9

School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) 8

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003) 7

United States v. Morrison, 529 U.S. 598 (2000) 6

Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (1970) 2, 8

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) 6

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 8

Statutes

Acts of the 4th Biennial Session of the General Assembly of Alabama, Held in the City of Montgomery, Commencing on the 2nd Monday in November 1853, No. 307, approved Jan. 16, 1854 (Brittan & Blue, State Printers 1854) 16

Acts of the 4th Biennial Session of the General Assembly of Alabama, Held in the City of Montgomery, Commencing on the 2nd Monday in November 1853, No. 6, approved Feb. 15, 1854 (Brittan & Blue, State Printers, 1854) 16

Acts of the Annual Session of the General Assembly of Alabama, Held in the City of Tuscaloosa, Commencing on the 1st Monday in December 1845, No. 256, approved Feb. 4, 1846 (John McCormick, Printer, Tuscaloosa, Ala., 1846) 13

Ala. Code § 16-18A-1(4)(f) (1975) 19

Ala. Code § 16-33A-1(3) (1975) 19

Ala. Code § 16-33A-1(4)(f) (1975) 3, 19, 20, 21

Ala. Code § 16-33A-2 (1975) 19

Pamphlet Acts of 1825-26, approved Jan. 10, 1826 11

Other Authorities

"Influence of Popery at the South," *The South Western Baptist* (formerly *The Alabama Baptist*), Vol. II, No. 38 (Dennis Dykous, Printer, Nov. 20, 1850) 15

"Influence of the Church of Rome," *The South Western Baptist*, Vol. II, No. 46 (Jan. 15, 1851) 16

"Popery," *The Alabama Baptist*, Vol. I, No. 45 (Dec. 9, 1843) 15

Charles Grayson Summersell, *Mobile: History of a Seaport Town* (1949) 11

Federalist No. 51 (J. Cooke ed. 1961) 5

Harriet E. Amos, *Cotton City: Urban Development in Antebellum Mobile* (1985) 11, 12, 13

John Craig Stewart, *The Governors of Alabama* (1975) 17

Journal of the Constitutional Convention of the State of Alabama 1875 (W.W. Screws, State Printer, Montgomery, Ala., 1875) 18

Lucille Griffith, *Alabama: A Documentary History to 1900* (Univ. of Ala. Press, 2d ed. 1972) 10, 11

Minutes of the Alabama Baptist State Convention and of the Baptist Bible Society, Nov. 21, 1847 (J.W. Spalding, printer, Marion, Ala.) 14

Opinion of the Justices, 280 So. 2d 547 (Ala. 1973) 20

Oscar Hugh Lipscomb, *The Administration of Michael Portier, Vicar Apostolic of Alabama and the Floridas, 1825-1829, and First Bishop of Mobile, 1829-1859* (1963) 12, 13, 17

Rose Gibbons Lovett, *The Catholic Church in the Deep South: The Diocese of Birmingham in Alabama: 1540-1976* (1980) 14

William Warren Rogers et al., *Alabama: The History of a Deep South State* (1994) 14

Regulations

6 Ala. Admin. Code R. 300-4-3-.01 et seq. 19

Constitutional Provisions

Ala. Const. of 1819, art. VI 11

Ala. Const. of 1875, art. IV, § 34 18

Ala. Const. of 1875, art. XIII, § 8 18

Ala. Const. of 1901, amend. 622 ..... 20, 21

Ala. Const. of 1901, art. XIV, § 263 ..... 9, 18

INTEREST OF AMICUS CURIAE

The State of Alabama, long a vocal proponent of federalism as a bedrock feature of the United States Constitution, has a strong interest in ensuring that principles of federalism are not distorted to justify state-sponsored religious discrimination. Simply put, states' rights do not trump fundamental, constitutionally grounded individual rights. Indeed, in recent years, the State of Alabama has assiduously avoided the moniker "states' rights" to define the principles of federalism that it has sought to vindicate in cases before this Court. Not only does the phrase evoke memories of a regrettable and all-too-recent era of invidious state-sponsored discrimination, it fundamentally misconceives the purpose of federalism.

Federalism is not designed to aggrandize the power of the States but to promote individual liberty, by dividing and checking power among the state and federal governments. Invoking principles of federalism to defend a practice of state-sponsored religious discrimination is not just ironic in its parallel to erstwhile Southern anti-civil rights rhetoric, it is antithetical to the core purposes of the first, tenth, and fourteenth amendments. A State has no constitutional obligation to set up a scholarship program in the first instance, but, having chosen to do so, the State has a constitutional obligation not to exclude citizens from the program on the basis of their religious choices. The State of Alabama submits this brief to urge that principles of federalism not be used as cover for religious discrimination, a constitutional transgression of which Alabama has been guilty as well.

SUMMARY OF ARGUMENT

The issue in this case is whether the State of Washington may exclude respondent Joshua Davey from its Promise Scholarship program because Mr. Davey intends to major in theology. Petitioner Gary Locke, Governor of the State of Washington, asserts that principles of federalism permit such governmental discrimination and that the State has a compelling interest in securing the wall of separation between church and state. Petitioner and the amici who back him are wrong, for at least two reasons.

First, it should be axiomatic that federalism principles do not permit States to violate the rights secured to their citizens by the United States Constitution. As Mr. Davey and the amici States of Texas et al. have articulated in their briefs, Mr. Davey has a fundamental constitutional right to be free from governmental discrimination on the basis of his religious choice. By excluding him from the Promise Scholarship program, the State of Washington has discriminated against religion. It has exited the constitutional safe haven of "benevolent neutrality" toward religion, *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970), and has entered the forbidden territory of overt discrimination against religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("the minimum requirement of neutrality is that a law not discriminate on its face"); *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990); *Larson v. Valente*, 456 U.S. 228, 244-46 (1982). The State may not justify this discrimination by vague invocation of federalism "concerns" and loose sloganeering about the maintaining the "wall" of separation between church and state.

Second, the Washington statute that singles theology majors out for discriminatory treatment has its roots in a state constitutional provision — the infamous Blaine amendment — whose purpose was demonstrably discriminatory and specifically anti-Roman Catholic. Washington and many other States, including Alabama, adopted these Blaine provisions in the latter half of the nineteenth century as part of a concerted movement to dilute the attractiveness and effectiveness of Catholic education. This ignoble heritage renders these provisions a suspect rationale, to say the least, for a modern-day policy of excluding religious majors from a general scholarship program. An analysis of the history of Alabama's own Blaine provision confirms that its purpose was not to further the religious freedom of its citizens but to stifle the spread of Roman Catholic religious beliefs within the State.

The State of Alabama does not take this position lightly. Like Washington, Alabama has never expressly repealed its Blaine provision. In 1978, Alabama enacted a student grant program that purports to discriminate on the basis of religious study, just as the Washington Promise Scholarship program does. Like the Promise Scholarship program, Alabama's student grant program limited participation to students who are "not enrolled and do[] not intend to enroll in a course of study leading to an undergraduate degree in theology or divinity." Ala. Code § 16-33A-1(4)(f) (1975). Other Alabama education statutes and regulations similarly have purported to exclude religious participants.

Fortunately, the need for a federal constitutional challenge to Alabama's Blaine provision and to its discriminatory scholarship programs was mooted in

1999. That year, Alabama enacted the Alabama Religious Freedom Amendment (ARFA) to its Constitution. ARFA made clear not only that the State could not discriminate openly against religion, as already forbidden by the free exercise clause of the first amendment, but that the State could not burden the religious exercise of its citizens, even with laws of general applicability, unless it had a compelling government interest to do so and had employed the least restrictive means of furthering that interest. It is the view of the Attorney General of Alabama that ARFA invalidated the Blaine provision of the Alabama Constitution to the extent that it required or permitted the discriminatory distribution of state educational funds.

In all events, with or without ARFA, Alabama would now concede that its Blaine provision and its discriminatory scholarship programs violate the first and fourteenth amendments. The Washington Promise Scholarship program does also. Exclusion of religious participants from public education programs is the relic of a myopic and bigoted era. It should not be tolerated in the name of federalism or any other structural constitutional principle.

ARGUMENT

I. The States May Not Invoke Principles of Federalism to Justify Overt Discrimination Against Religion.

Principles of federalism require proper respect for "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999). But the sovereign powers of the States have obvious constitutional limits. Proper respect for the sovereign powers of the States requires consideration of the

objectives underlying the division of the powers of government between state and federal sovereigns in the United States Constitution.

In Federalist Number 51, James Madison describes the principle of "double security" incorporated into the United States Constitution:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the right of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Federalist No. 51, pp. 350-51 (J. Cooke ed. 1961).

To safeguard individual liberties, the powers of government are first divided, then twice checked. The power of the federal government is limited to the specific grants of authority given to it by the people through their Constitution. Any powers of government not specifically granted to the federal government are reserved to the States. States are free to govern themselves within the boundaries established by the lawful acts of the federal government and the constitutional principles applied to the States through the fourteenth amendment. The supremacy clause commands that, to the extent state law conflicts with federal law, federal law controls.

To ensure that each government operates within its proper sphere and in accordance with overarching constitutional principles, the Constitution imposes dual checks upon both state and federal powers. The recent federalism decisions of this Court demonstrate the

critical function that it performs in Madison's "double security" scheme. To check the unauthorized use of federal power, the Court acts to restrict federal laws to those authorized by the Constitution. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacked the authority, under the commerce clause, to provide a civil remedy for sexual assault in the Violence Against Women Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress lacked the authority, under section five of the fourteenth amendment, to impose the Religious Freedom Restoration Act on the States).

The Court also requires a clear statement of congressional intent "to alter the 'usual constitutional balance between the States and the Federal Government.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). "[T]he clear statement principle reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 544 (2002) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)). In interpreting the scope of federal law, this Court is careful to interpret statutes so as not to effect "substantial change in the balance of federalism unless that is the manifest purpose of the legislation." *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002).

The States have a critical role also to test the limits of federal legislative and regulatory power through appropriate channels of litigation. *E.g., Garrett v. Univ. of Alabama at Birmingham Bd. of Trustees*, 531 U.S. 356 (2001) (holding that Congress did not validly

use its remedial power, under the fourteenth amendment, to subject the States to claims for money damages under the Americans with Disabilities Act); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that in enacting Title VI, which prohibits intentional discrimination against members of suspect classes, Congress did not create a private right to enforce disparate impact regulations promulgated by federal agencies through litigation against the states).

In turn, the States' exercise of power is checked by people like respondent Joshua Davey, who bring lawsuits in federal courts to resist state encroachment on individual liberty. The courts act to ensure that the States operate within their proper sphere of power and without violating federal rights. In this manner, the American people, though their Constitution, have divided and checked the powers of government, creating "a government of laws and not of men."

Consistent with the division of state and federal powers, federalism dictates that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1523 (2003). This Court ensures, however, that the States' judgment is exercised according to overarching principles of federal constitutional law. *See, e.g., Rinaldi v. Yeager*, 384 U.S. 305 (1966) (holding that a state statute that imposed certain court costs on indigents defendants who are imprisoned but not on those who were not imprisoned violated the equal protection clause). Although States have some discretion to decide what activities they will and will not fund, that discretion is constitutionally bounded. For example, States may not provide funding to private schools so as to assist in maintaining a separate and

discriminatory school system. *Norwood v. Harrison*, 413 U.S. 455 (1973) (invalidating Mississippi textbook program that "significantly aided organization and continuation of separate system of private schools which might discriminate if they so desired").

With regard to the establishment clause, "it may well be that state action should be evaluated on different terms than similar action by the Federal Government." *Zelman v. Simmons-Harris*, 536 U.S. 639, 678-79 (2002). Sound federalism principles may compel some "play in the joints" between what the establishment clause requires and what it permits. *Norwood*, 413 U.S. at 469. Ordinarily, that "play in the joints" will favor religious freedom, however, in view of the pro-religion purposes of both the free exercise and establishment clauses. *See, e.g., Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970) (permitting New York City Tax Commission to exempt religious organizations from paying taxes on property used solely for religious purposes); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding exemption of religious organizations from Title VII prohibition against religious discrimination). The States must always treat religion with a neutrality best described as "benevolent." *Walz*, 397 U.S. at 669; *see also School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring). The States may not "impede free exercise rights or any other individual religious liberty interest" in the name of federalism, or separation of church and state, or any other legal concept of similar abstraction. *Zelman*, 536 U.S. at 678-79.

For the reasons stated by respondent and the amici States of Texas et al. in their briefs, the Washington Promise Scholarship Program violates the neutrality

principle of the first amendment. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995) (discussing requirement of neutrality in the Establishment Clause); *Smith*, 494 U.S. at 877 (discussing requirement of neutrality in the Free Exercise Clause). By employing Mr. Davey's declaration of a major in theology as the sole basis for its decision to deny him a Promise Scholarship, the State of Washington has overtly discriminated against religion. This discrimination cannot in any way be characterized as the "benevolent neutrality" commanded by the federal Constitution.

II. Alabama's Own Constitutional History Exemplifies the Invidious Purpose of State Education Funding Programs That Exclude Participants on the Basis of Their Religion.

Alabama, like the State of Washington, has a Blaine provision in its Constitution that purports to forbid the transfer of public funds to religious schools. Ala. Const. of 1901, art. XIV, § 263. Blaine provisions, or amendments, are rooted in anti-Catholic sentiment that was prevalent in this country during the latter half of the nineteenth century. Alabama history illustrates this discrimination well. Blaine amendments afford no justification whatsoever for modern-day discrimination against religion.

Before the emergence of anti-Catholic sentiment in Alabama, state education funds were shared among all private schools, both secular and religious, including Catholic schools. Bigotry against Catholics led to the inclusion of a Blaine provision in the Constitution in 1875. That provision, in turn, led to the creation of a student grant program in 1978 that, like Washington's Promise Scholarship program, discriminates against students who choose to major in theology. Unlike

Washington, however, Alabama would now concede that its student grant program violates the first and fourteenth amendments of the United States Constitution.

A. Alabama's Blaine provision was designed to stifle the growth of Roman Catholic beliefs within the State.

Before the enactment of its first Blaine provision in its Constitution of 1875, Alabama had a history of encouraging education in the State by distributing available public funds among existing private institutions, including religious schools. Catholic schools, which were the oldest schools in the state, participated in this distribution of funds without discrimination, until an anti-Catholic sentiment, common to other regions of the country, took root in the latter half of the nineteenth century. Beginning in 1854, anti-Catholic sentiment led Alabama to discriminate against Catholic schools in the sharing of public school revenues. Then, in 1875, through the incorporation of a Blaine provision into its Constitution, Alabama ensured that no public funds would be provided for Catholic religious instruction by prohibiting expenditures of state education funds "for the support of any sectarian or denominational school."

Settlers in territorial Alabama had begun working to establish schools as early as 1805. Lucille Griffith, *Alabama: A Documentary History to 1900* 246 (Univ. of Ala. Press, 2d ed. 1972). Green Academy in Huntsville, in the northern part of Alabama, was chartered by the territorial legislature in 1812. *Id.* at 247-48. Like many early schools in Alabama, Green Academy was a hybrid institution: It was chartered by the government and received funds from the public treasury and from a

state-sanctioned lottery, but it also relied heavily on private tuition. *Id.* at 248.

In 1819, when Alabama was admitted to the Union, the sixteenth section of each township was reserved for the support of a school for that township. Harriet E. Amos, *Cotton City: Urban Development in Antebellum Mobile* 179 (1985). The 1819 Constitution of Alabama provided no public funding for education, beyond the income generated by the sixteenth-section lands, but simply provided, "Schools and the means of education shall forever be encouraged in this State." Ala. Const. of 1819, art. VI.

By 1823, advertisements appearing in newspapers made evident that several private schools were operating in Mobile. Charles Grayson Summersell, *Mobile: History of a Seaport Town* 30 (1949). Before 1826, however, there was no legal authority in Alabama for the regulation of schools by a division of government.

The first public school system in Alabama was established in its oldest city, Mobile. In 1826, the Alabama Legislature enacted a bill drafted by Mobile's representative, Willoughby Barton, establishing a board of Mobile School Commissioners and empowering the board to establish and regulate schools in Mobile County. Pamphlet Acts of 1825-26, pp. 35-36, approved Jan. 10, 1826; Amos, *Urban Development* at 180. This act also provided public sources of funding for education in Mobile County, in addition to the income from sixteenth-section lands, including revenue from taxes imposed on auction sales, court filing fees, fines, penalties, license taxes on theatrical performances, and a school fund lottery. *Id.*

The revenues generated for education in Mobile County were not sufficient to establish free public schools. Instead, for the next few years, school commissioners used public funds to enhance the education provided by private schools. This funding in turn enabled the private schools to provide free or reduced tuition for a few indigent pupils. Amos, *Urban Development* at 181.

The Mobile school board envisioned an organized system of education, however. In 1835 and 1836, the three-story Barton Academy was constructed on Government Street. Amos, *Urban Development* at 181. The construction was funded by private donations, a city loan, a state-approved lottery, the school commissioners' fund, and a loan taken out by the commissioners. *Id.* at 181-82. For several years the school commissioners struggled to pay off the construction debt and keep Barton Academy open, but limited funding forced them to close the school. *Id.* at 182-83. When the public free school closed, the school commissioners channeled public funds, including taxes for education, into free schools operated by churches. *Id.* at 183.

By the mid-nineteenth century, both Catholics and Protestants operated free schools in Mobile. The Catholic free schools were the oldest free schools in the City of Mobile. Amos, *Urban Development* at 184. In 1838, a Catholic orphanage was established in Mobile, and at about the same time, two Catholic schools were opened, one for boys and one for girls. Oscar Hugh Lipscomb, *The Administration of Michael Portier, Vicar Apostolic of Alabama and the Floridas, 1825-1829, and First Bishop of Mobile, 1829-1859* 228 (1963). By 1844, the Catholic schools were providing instruction to 90 orphans in addition to 60 girls and 40 boys. *Id.* at 229.

In 1842, the Methodists, in cooperation with the Unitarians, opened the first Protestant free school in Mobile. Amos, *Urban Development* at 184.

In 1846, the Alabama Legislature began permitting taxpayers to redirect the "common and ordinary school taxes" that were being levied for educational purposes in Mobile County to the free schools operated by churches. Acts of the Annual Session of the General Assembly of Alabama, Held in the City of Tuscaloosa, Commencing on the 1st Monday in December 1845, No. 256, pp. 192-93, approved Feb. 4, 1846 (John McCormick, Printer, Tuscaloosa, Ala., 1846). The act further provided "that admission to said school shall be free to all children" and "without distinction of faith." Thus, "a taxpayer could designate whether his school tax would go to a free school run by his denomination or to the general school fund." Amos, *Urban Development* at 183. Under the 1846 act, public school taxes in Mobile were re-directed to the Methodist Free School and eventually to the Presbyterian Bethel School and the Catholic and Episcopal free schools. *Id.*

By mid-century, for purposes of administration, the Catholic schools had been divided into "pay" and "free" schools. Lipscomb, *Administration of Michael Portier* at 230. Income from the pay schools was being used to defray the expenses of the free schools. *Id.* In 1851, receipts from the pay schools accounted for $2,225 in the budget of the free schools. *Id.* at 233.

That same year, the budget of the free schools included an appropriation of $500 from the commissioners of county revenue, $375 from the school board, and $195 from municipal funds. *Id.* By 1852, the City of Mobile was contributing public funds to the Presbyterian, Catholic, Episcopal, and Methodist free schools. Amos, *Urban Development* at 184. Thus, the

Catholic and Protestant free schools of Mobile County operated successfully for a time as hybrid institutions, relying on both public and private funding.

Among the other schools in operation in Mobile during this time was Spring Hill College, founded in 1830 by the Right Reverend Michael Portier, the first Bishop of the Catholic Diocese of Mobile. Rose Gibbons Lovett, *The Catholic Church in the Deep South: The Diocese of Birmingham in Alabama: 1540-1976* 5 (1980). Spring Hill was the second college in Alabama and the first permanent Catholic college in the South. William Warren Rogers et al., *Alabama: The History of a Deep South State* 325-26 (1994). It was placed under the jurisdiction of the Jesuits in 1847. *Id.* Judson Female Institute was founded by Baptists at Marion in 1938. By 1847, the Baptist Bible Society stated that it was planning for Judson to serve as a "normal school," i.e. a college for training elementary school teachers. *Minutes of the Alabama Baptist State Convention and of the Baptist Bible Society, Nov. 21, 1847* 12 (J.W. Spalding, printer, Marion, Ala.). In 1854, Methodists founded Southern University at Greensboro. Rogers, *Deep South State* at 326.

Meanwhile, an anti-Catholic sentiment was brewing in Alabama. By 1843, anti-Catholic sentiment was being openly expressed. That year, *The Alabama Baptist* denounced "Popery" in an article, charging that Roman Catholics were seeking to replace the "powers of government" with an allegiance to the Pope, by systematically "superintend[ing] and direct[ing] the systems of education" in the United States. The article charged that "several hundreds of Jesuit priests" had been sent from Rome to the United States, "to bring the common schools of the United States exclusively under

their control." "Popery," *The Alabama Baptist,* Vol. I, No. 45, p. 2 (Dec. 9, 1843).

In 1850, anti-Catholic sentiment was directed at the perceived dangers posed by Catholic educational institutions. *The South Western Baptist* (formerly *The Alabama Baptist*), warned of the dangers of allowing children to attend Catholic schools:

> The church of Rome has dotted various parts of the South with her schools and seminaries for young ladies. In these, the daughters of many of the most respectable and wealthy Protestants are educated. No one who is aware of the object for which such schools were originated, or with the course of discipline and instruction adopted in them, can suppose that young ladies can pass through them untouched by the sentiments or superstitions of Popery. Many young ladies of these schools have entered the Roman Catholic church very much to the grief of their parents. The parents had committed their daughters to the institutions, receiving the usual pledges from the instructors that nothing should be done to unsettle the religious opinions they had taught their children. With such pledges they thought there was no danger. They did not believe it to be a dogma of the Roman church "that no faith is to be kept with heretics." But when it was too late to save their daughters they most sincerely regretted that they ever sent them to such schools. In every place, I hear startling and melancholy facts on this subject.

"Influence of Popery at the South," *The South Western Baptist* (formerly *The Alabama Baptist*), Vol. II, No. 38, p. 1 (Dennis Dykous, Printer, Nov. 20, 1850). Two months later, another article warned readers of the

"tendency of Papal domination," asserting that the "chief object" of Roman Catholicism during the "last three centuries" has been to "stunt the growth of the human mind." "Influence of the Church of Rome," *The South Western Baptist,* Vol. II, No. 46, p. 1 (Jan. 15, 1851).

Three years later, Alabama enacted anti-Catholic legislation directed at the only public system of education that existed in the state at that time: the Mobile County school system. The act prohibited the diversion of Mobile County pubic school funds to any school "that is not strictly common to all children of the county, or to any that is under sectarian influence or control." Acts of the 4th Biennial Session of the General Assembly of Alabama, Held in the City of Montgomery, Commencing on the 2nd Monday in November 1853, No. 307, pp. 190-91, approved Jan. 16, 1854 (Brittan & Blue, State Printers, 1854). Later during that same session, legislation was passed to establish a system of public schools throughout the rest of Alabama. *Id.*, No. 6, pp. 8-19, approved Feb. 15, 1854. This statute gave the superintendent of education the duty "to carefully guard that no sectarian religious views shall be inculcated in such schools." *Id.*, art. II, § 3(9). Article V, section 2(16) of this same statute provided as follows:

> In every school there shall be at least one teacher, who shall be authorised, under the direction of the trustees, to enforce such *moral, social and educational discipline* as may be necessary to good order and studious habits; and with the consent of the said trustees, he shall have the power to remove from the school any refractory or *immoral* pupil, when the welfare of the institution may require it.

(Emphasis added.)

In 1854, the growing anti-Catholic sentiment in Mobile led to charges against the Catholic Sisters of Charity who had been given charge of the City Hospital in 1852. Lipscomb, *The Administration of Michael Portier* at 261-65. In 1853, the Sisters of Charity had been "universally praised for their selfless dedication to the sick" during an epidemic of yellow fever — a dedication that, indeed, cost two of the Sisters their lives. *Id.* at 261-62. By the summer of 1854, however, the Know-Nothing Party had organized in Alabama, and Mobile was one of their strongholds. *Id.* at 262. The Sisters of Charity came under attack, and sixteen charges were lodged against their administration of the hospital. *Id.* Despite a complete lack of evidence to support the charges, political considerations caused the mayor to cast a deciding vote against the Sisters. *Id.* at 265. The mayor's political instincts, though pusillanimous, were astute. The next year the Know-Nothing Party captured every office in the City of Mobile. *Id.*

The Know-Nothing party entered Alabama state politics in the gubernatorial race of 1855, seeking to reform "everyone who disagreed with them or anyone who was Catholic or of foreign birth." John Craig Stewart, *The Governors of Alabama* 96 (1975). The party gained support, and as a result, "there were even some floggings of Catholics and 'foreigners' in the old civilized city of Mobile." *Id.* The Know-Nothing candidate for Governor, George D. Shortridge, lost the election to the incumbent but received over 30,000 votes. *Id.* at 97.

The 1875 Alabama Constitution contained the state's first "Blaine" provision: "No money raised for the support of the public schools of the State shall be

appropriated to, or used for, the support of any sectarian or denominational school." Ala. Const. of 1875, art. XIII, § 8. As originally worded, the provision read: "No money raised for the support of the public schools of this State shall be appropriated to, or used for the support of any sectarian school." An amendment was offered that added the words "or denominational" after the word "sectarian," and the provision was later adopted with the suggested amendment, without discussion. *Journal of the Constitutional Convention of the State of Alabama 1875* 155 (W.W. Screws, State Printer, Montgomery, Ala., 1875). The 1875 Constitution also provided as follows:

> No appropriation shall be made to any charitable or educational institution not under the absolute control of the state, *other than normal schools*, established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house.

Ala. Const. of 1875, art. IV, § 34 (emphasis added). The exception for "normal schools" appears designed to have permitted Judson Female Institute, a Baptist school, to continue receiving state funds.

The Blaine provision was carried forward into the present Constitution of Alabama, which states, "No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school." Ala. Const. of 1901, art. XIV, § 263.

B. Alabama has recognized that its student grant program, which, like Washington's Promise Scholarship program, excludes religious participants and was enacted to comply with a Blaine provision, violates the first and fourteenth amendments.

In 1978, Alabama enacted a student grant program to provide financial assistance to residents of the State who chose to attend "accredited independent colleges and universities." Ala. Code § 16-33A-2 (1975). The purpose of the program was to "narrow the gap in student charges between public universities and colleges and independent institutions of higher education in Alabama." *Id.* Like Washington's Promise Scholarship program, Alabama's program excluded religious participants so as to comply with the Blaine provision of the Alabama Constitution. The program defined an "eligible student" as one that "[i]s not enrolled and does not intend to enroll in a course of study leading to an undergraduate degree in theology or divinity." Ala. Code § 16-33A-1(4)(f) (1975). The program further defined "approved institution" as one having "an academic curriculum which is not comprised principally of sectarian instruction or preparation of students for a sectarian vocation and which does not award primarily theologian or seminarian degrees." Ala. Code § 16-33A-1(3) (1975). Other Alabama education statutes and regulations similarly purport to require discrimination against religion. *See, e.g.*, Ala. Code § 16-18A-1(4)(f) (1975); 6 Ala. Admin. Code R. 300-4-3-.01 et seq.

This discrimination was thought to be required by Alabama's Blaine provision. In 1973, the House of Representatives of the Alabama Legislature sought an advisory opinion of the Alabama Supreme Court with

respect to a student grant program similar to the program created in 1978. *Opinion of the Justices*, 280 So. 2d 547 (Ala. 1973). The 1973 grant program differed from the 1978 program in one important respect: the 1973 program did not restrict eligibility based on the student's choice of a religious course of study or of a religious school. *Id.* The House of Representatives requested the opinion of the Alabama Supreme Court on the constitutionality of the proposed student grant program. *Id.* Six of the nine Supreme Court Justices expressed the opinion that the proposed student grant program violated Alabama's Blaine provision, as well as the first amendment of the United States Constitution. *Id.* at 553. In 1978, a revised student grant program was enacted, restricting participation to students who were not pursuing "a course of study leading to an undergraduate degree in theology or divinity." Ala. Code § 16-33A-1(4)(f) (1975).

Because it discriminates against an individual on the basis of religion, Alabama's student grant program is subject to strict scrutiny, as is Washington's Promise Scholarship program. *Lukumi Babalu*, 508 U.S. at 533 (1993); *Smith*, 494 U.S. at 877; *Valente*, 456 U.S. at 244-46. The Blaine provision of the Constitution of Alabama, itself grounded in anti-religious prejudice, does not provide a compelling state interest that justifies such discrimination. Neither does Washington's Blaine amendment.

Fortunately, the need for a federal constitutional challenge to Alabama's student grant program was mooted in 1999. After the decision of this Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), invalidating the federal Religious Freedom Restoration Act, Alabama enacted its own Religious Freedom Amendment. Ala. Const. of 1901, amend. 622. The

Alabama Religious Freedom Amendment (ARFA) recognizes that federal and state laws that appear "'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § II(2). ARFA secures to Alabama citizens the free exercise of religion and prohibits the branches of government — including the State and its political subdivisions, municipalities, and other local governments — from burdening a person's freedom of religion, even through laws of general applicability, unless the law furthers "a compelling governmental interest" and unless it is "the least restrictive means of furthering that compelling governmental interest." *Id.* § V. Because ARFA forbids the government to impose burdens on religious choices absent compelling justification, that portion of the 1978 student grant program which denies grants to students who "enroll in a course of study leading to an undergraduate degree in theology or divinity," Ala. Code § 16-33A-1(4)(f), does not survive ARFA.

In all events, with or without ARFA, it is the position of the Attorney General of Alabama that the 1978 student grant program violates the first amendment because it discriminates against religion. For the same reasons, Washington's Promise Scholarship program violates the first amendment. That other States may also have such discriminatory scholarship programs and may also still have Blaine amendments on their books is no reason to punch holes in the anti-discrimination principle that is the bulwark of free religious exercise in the first amendment.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

William H. Pryor Jr.
Attorney General

Nathan A. Forrester
Solicitor General

Margaret L. Fleming
Assistant Attorney General
Counsel of Record *

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401, 353-3738 *

September 8, 2003